INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD

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Teaching general public international law

FLORIAN HOFFMANN

1 Introduction

Teaching 'public international law' (PIL) is a tricky if fulfilling business. It tends to be slated either at the very beginning of a typical law curriculum when students have little idea yet of how law as such 'works', or at its very end, when the majority of students who do not wish to become international lawyers see little point in studying what to them appears a marginal and softish subject. In either case, the job is not made easier by having to introduce a type of normativity that is both archaic and ephemerous by the canonical standards of 'the Law'. Inevitably, questions about the legality and relevance of the body of rules referred to as international law feature prominently in introductory discussions, accompanied, sometimes, by discrete musings on the part of students about what international lawyers 'really' do in life and for a living. Yet, the comparatively high entry threshold that characterises PIL teaching is also what, arguably, makes it so rewarding and fascinating a subject to teach. For it is (only) because of lingering questions such as 'is international law really law?' that the PIL teacher is forced to continuously retell its story, to argue its point, to justify its existence.[1] There is, of course, a considerable amount of literature on international law teaching and an even greater one on the historical roots of modern, or, to go by this volume's editors' preference, post-modern international law as a distinct discipline and field of study.[2] It would probably take a multi-volume treatise to review this literature and provide a systematic account of the specific predicament faced by teachers of international law. However, the task set by the editors was

[1] For an excellent summing up of the predicament of teaching PIL, see Gerry Simpson, 'On the Magic Mountain: Teaching International Law' 10 *EJIL* (1999) 70–92.

[2] An overview of the considerable specialist literature on international law teaching has usefully been compiled by the Thomas Jefferson School of Law, available at www.tjsl.edu/slomansonb/6th_Teach_Bib.pdf.

'only' to engage with the legacy of legal positivism in the international law classroom, not with legal positivism in and of itself, or with teaching law in and of itself. Yet, as those engaged in international legal theory well know, it is, in this multi-faceted field, nearly impossible to do such a thing without also looking at the broader picture, at the defining debates and streams in contemporary international legal discourse. However, as that, too, would require a multi-volume dissertation, the thoughts presented below are, by necessity, somewhat mosaic and epigrammatic, perhaps occasionally even a bit short-circuited. This is meant to serve the purpose of cutting through, within limited space, to what are here taken to be some of the central points of the debate about the positivist legacy and the specific challenges of teaching it, though at the cost of nuance and comprehensiveness.

The story of international law is, of course, the story of a paradox, namely of what Martti Koskenniemi has notoriously described as the dichotomy between apology and utopia, that is, between a reality shaped by power and an ideal represented by legal norms.[3] Hence, as a language game conceived to give voice to the paradigm of the 'modern state system' –territorially based nation-states defined by sovereignty – international law has always at once had to represent and to constitute the world of states and their dealings with each other. As such, it has been seen both as a function of the powers that constitute – sovereign will,[4] cosmopolitan values,[5] colonialism,[6] capitalism,[7] etc. – and as governing these powers from the vantage point of an independent and, from its own perspective, politically progressive purpose. This paradoxical 'structural coupling' makes international law a methodologically unique field of jurisprudence. It articulates a horizontal, rather than vertical, normativity in which there is neither a clear-cut international *pouvoir constituant*

[3] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co. 1989, reissued Cambridge University Press 2005).

[4] See exemplarily Ian Brownlie, *Principles of Public International Law* (7th edn Cambridge University Press 2008).

[5] For instance, Mortimer Sellers, 'Parochialism, Cosmopolitanism, and Justice' in Mortimer Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press 2011) 250–276.

[6] Anthony Angie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007).

[7] See, generally, Susan Marks, *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge University Press 2008); and, in particular, China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005).

nor a universal sovereign.[8] Its traditional sources bind it to the facticity of inter-state relations, yet it is also meant to constrain and regulate these relations. Unlike domestic law, its practice is not merely about applying norms to facts, but also always about (re-)establishing the particular normativity that is to apply. As a discipline, international law is, therefore, inherently argumentative, and its practice is deeply theoretical, yet, it has struggled with a self-reflexive and self-conscious engagement with its own methodological identity.

In part, this difficulty stems from the underlying theoretical assumptions that inform international law's practice, including its teaching, which, arguably, tend to be informed by a sort of *positivisme diminué*. Rather than being appreciated as a substantive (theoretical) position on the autonomy of (international) legal norms, positivism is held to be a didactic programme through which international law is made to emulate the structure of the positivised law of the constitutional state.[9] Its horizontal fluidity is replaced by a simulacrum of verticality through the canonisation of its sources and subjects, so that its student encounters a law much like all other (state) laws with which she has become acquainted. This programme, manifest in the textbook tradition, engenders, in turn, the expectation on the part of students that international law be taught as if it was just like any other legal subject.[10] The challenge faced by teachers of international law, then, is to reach through the pseudo-positivist textbook tradition and to reconstruct positivism as a distinct perspective. To that end, the specific challenges of teaching international law need to be considered, as well as the strategies available to deal with them. This, in turn, will throw light on how and why such pseudo-positivism emerges in the classroom, and it will allow the reconstruction of positivism proper as both a methodological stance and as a historically influential legal theory. It will also enable a reassessment of the role of positivism in contemporary international law and its teaching.

[8] For an approximation, see Philipp Dann and Zaid Al-Ali, 'The Institutionalized *Pouvoir Constituant* – Constitution-Making under External Influence in Iraq, Sudan and East Timor' 10 *Max Planck Yearbook of United Nations Law* (2006) 423–463.

[9] Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' 47 *Harvard International Law Journal* (2006) 223–242.

[10] David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed.), *Legal Theory and Common Law* (Blackwell 1986) 26–62; Anthony Carty, 'A Colloquium on International Law Textbooks in England, France and Germany: Introduction' 11 *EJIL* (2000) 615–619.

2 Doctrine v. practice v. theory: the predicament of teaching public international law

It is a well-known experience shared by teachers across diverse legal systems that to many law (school) students, international law is at first a confusing subject.[11] They tend to be taught 'the law' through a set of strictly prescribed methods by which to identify and apply clearly delimited rules to facts. What is worse, these methods vary across national legal systems and are largely incommensurable, thus locking their practitioners into the professional horizon of a particular country or region. Hence, from the vantage point of the domestic lawyer, and law student, international law represents not just a different subject matter, but an entirely different episteme. As a consequence, students tend to initially either reject it in broadly Austinian terms as not really law, but a positive international morality;[12] or they confuse it with diplomatic history or 'international affairs' generally. Not that students would a priori lack interest in such issues as recognition, jurisdiction, responsibility or, indeed, territorial title or even maritime zoning, but few would initially approach these as purely legal, rather than primarily political or moral issues. The legality of international law remains, thus, not only the defining theme of the discipline's self-reflection, but also the core challenge to teaching it. This begins with international law's horizontality, that is, the absence of a clearly identifiable international source of legal authority beyond the hypostatised collective will of states. Whereas this poses no great problem for either 'pure' practitioners, who tend not to waste their time with conceptual intricacies, nor for professional scholars, who have learned to countenance the indeterminacy of international law's foundations, it does represent a major entry barrier to law students who are being trained to decipher legal rules by identifying their precise place within a preordained and largely static hierarchy.

The idea that the legal authority of a norm has to be ascertained in each case from among several sources of equal status before it can be applied to any factual situation at first appears strange to many students.[13] The

[11] 'Teaching of International Law', Material from an ASIL Teaching Initiative and ILA Committee on Teaching International Law Joint Workshop held in Washington, DC, on 3 April 2004; available at www.ila-hq.org.

[12] John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, Vol. 1 (Robert Campbell (ed.), 5th edn John Murray 1885) 61.

[13] For an excellent discussion of this, see the first part of Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford

sources themselves then add to this sense of strangeness, with their centrepiece, custom, meant to be ascertained through the counter-intuitive linking of what states seem to be doing and what they 'think' they are doing.[14] Add to this an indeterminate set of general principles the main distinguishing mark of which – from many a student's perspective – is that they are spelled out in Latin, as well as the (apparent) possibility to simply bypass all of these sources altogether by resorting to an equitable, i.e. judge-made, solution, and students are likely to give up on trying to comprehend international law as a coherent normative system. As if this was not enough, the lack of a comprehensive scheme to enforce these norms is taken in many classrooms to further undermine their legal character. Without a credible story about the power behind the norms, international law may easily appear as mere 'lawyer's law', made to sustain the profession's utopia in the face of impotence vis-à-vis almighty sovereigns. Related to this, at least in students' minds, is the question of the separability of legality from legitimacy.[15] While this is one of the core features of legal positivism, it is by no means self-evident to the student. From her vantage point, submission to international rules can initially only be made plausible if these rules are shown to either advance a however defined collective interest or if they serve some higher moral purpose;[16] conversely, international law is deemed illegitimate if it is seen as preventing the pursuit of either.[17] This attitude expresses, of course, an often inadvertent scepticism about the autonomy of norms in inter-state relations, which contrasts with the equally inadvertent acceptance of the facticity of that autonomy in domestic law. Here, too, international law is held to be fundamentally different from domestic law. The predicament

University Press 2011); see also David Kennedy, 'The Sources of International Law' 2 *American University Journal of International Law and Policy* (1987) 1–96.

[14] Koskenniemi, n. 3 at 389–396.

[15] Originally so formulated by HLA Hart, *The Concept of Law* (3rd edn Oxford University Press 2012) 185–212 and, arguably, reinforced in his article: HLA Hart, 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* (1957–1958) 593–629; also John Gardner, 'Legal Positivism: 5½ Myths' 46 *American Journal of Jurisprudence* (2001) 199–227.

[16] A good way to exemplify this sentiment is the current discussion on the 'responsibility to protect'; see, inter alia, Jutta Brunnée, 'International Law and Collective Concerns: Reflections on the Responsibility to Protect' in Tafsir Malick Ndiaye, Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill 2007) 35–52; Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).

[17] For a contemporary articulation of this critique, see Jack Goldsmith, Eric Posner, *The Limits of International Law* (Oxford University Press 2006).

in which many teachers of international law, therefore, see themselves is one in which they continuously run up against a wall of doubt, not least about the place of international law in the general law curriculum, its professional aura, and its relevance to the political issues it means to address.

There are, in essence, three strategies available to teachers of international law to approach the subject and scale this wall of doubt. Positivism as a term of art and a mindset plays a key role in each of these, although, as shall be seen later on, these roles differ starkly in terms of the meaning they attribute to positivism. They can, in shorthand, be named, respectively, as 'doctrine', 'practice' and 'theory'. The first emanates from the medieval and Renaissance natural law tradition and refers to interpretation and systematisation of the law.[18] It has always been the legal scholar's, and, therefore, by implication, also the teacher's 'natural' approach as it presents students with a rationalised and coherent system of rules that, as such, is the construct of reflection rather than operation. Yet, unlike what is here labelled as the – distinct – theory-oriented approach, doctrine does not purport to provide understanding of the law from some external vantage point, but it merely seeks to explain it from within. It does so by attempting to unite an otherwise disparate set of norms, principles, administrative acts, court cases and procedural habits into a logically structured system. In this it follows the scholastic form out of which the legal doctrinal approach grew, notably by organising the 'real' world of legal concepts hierarchically, making each identifiable through its particular place on a vertical scale. Insofar as the doctrinal approach grew out of the medieval reception of Roman law, this ordering was largely representational and not practical, its primary purpose was knowledge and not the settlement of disputes.[19] Doctrine is, thus, quintessentially academic law geared to be taught in the privileged forum of the university through prescribed methods. There was, hence, initially, a professional gap between the doctrinalist and the practitioner, which went along with different conceptions of the law and of legal education. This lies, of course, at the root of the differentiation at least of Euro-American legal systems and the agglomeration of national legal systems alongside the

[18] Anthony Carty, 'Convergences and Divergences in European International Law Traditions' 11 *EJIL* (2000) 713–732; Anthony Carty, *Philosophy of International Law* (Edinburgh University Press 2007) 1–25 (ch. 1).

[19] Raoul Charles van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press 1992).

fundamental divide between the civil and the common law tradition.[20] Hence, today, doctrine in this wider sense forms a core aspect of legal education across the systemic divide. It has also transcended the categorisation as being a purely scholarly exercise and has, instead, acquired one of being a foundation for practice. Colloquially, the term is now used to denote the systematisation of the rule clusters that form the distinct sub-areas of the law. It thus comprises, from a common law perspective, the authoritative interpretation of case law as much as principles and secondary rules.[21]

The second strategy used to approach the predicament of international law teaching is to focus on practice. Certainly, contemporary international law doctrine is also deeply infused with practice, but what is often referred to as the practitioners' approach seeks deliberately to dispense with the sort of internal rationalisation characteristic of doctrine.[22] Here, the starting point – and for traditional practitioners, natural boundary – is state practice, taken to be the constitutive element of international law. Rather than to deduct, as in the doctrinal approach, such practice from the interplay between the different components of an international legal system, however defined, the practitioner's approach simply reconstructs international law inductively, as the sum of individual instances of norm-application. However, the objective here is not to represent international law as a system, but to explain how it works in 'reality'. The practice-oriented approach does not, therefore, generally engage in the questions that lie at the heart of doctrine, such as the nature of legal obligations, but presumes the existence of valid international norms on the basis of the apparent facticity of normativity as a basis for interstate relations. However, unlike the doctrinal approach, the practitioner's perspective is fundamentally elastic with regard to observed and observable (state) practice and is, as such, empiricist, as opposed to idealist, in its epistemology. Teaching-wise, the practice approach implies a strong emphasis on jurisprudence which makes international law appear, in students' eyes, like a web of cases connected by a set of overarching principles. Here, knowing the law means knowing how the law works rather

[20] Thomas Lundmark, *Charting the Divide between Common and Civil Law* (Oxford University Press 2012).

[21] See, for instance, the presentation in a typical textbook such as Malcolm Shaw, *International Law* (6th edn Cambridge University Press 2008).

[22] The quintessential example of this is, of course, Brownlie, n. 4; for a critical discussion of Brownlie's approach, see Colin Warbrick, 'Brownlie's Principles of Public International Law: An Assessment' 11 *EJIL* (2000) 621–636.

than what it means. As such, the practitioner's approach is also inherently pragmatic, based on (legal) fact and geared towards (successful) action.

Third, there is the strategy of theorising (about) international law. As a field of practice, international law is, of course, inherently argumentative and, therefore, deeply, if often inadvertently, theoretical. During the foundation period of the discipline up to the nineteenth century, this was unproblematic, as international lawyers tended to be general scholars in the humanist tradition who combined a wide array of vocabularies and methods to deduce the law of nations and offer it to the prince's ear.[23] Theory was then seen to be at the heart of practice. It was only from the latter part of the nineteenth century that a gap began to open up between the attempt to understand the normative quality of international relations and the practice of applying an increasingly canonical body of well-established 'objective' rules to the conduct of states and other international actors. Initially (and arguably), that gap was still seen as a development rather than a divide, for the practice of positivised international law was closely associated with theoretically inspired concerns with world peace and social justice.[24] Yet, especially as of the inter-war and then post-war periods, and helped by the seeming breakdown of the theoretical constructs on which the older law of nations had been built, the 'practitioner's approach' came to dominate the discipline.[25] This meant a shift away from scholarly argument to judge-made law, with the emphasis on formal legal process reducing the reflective space for theorising. As a result, theory has tended to be confused with doctrinal analysis reduced to the systematisation of a canonical body of rules, with (theoretical) questions about their historical pedigree or their political connotation being considered outside the remit of the international lawyer. Theorisation in order to understand rather than to merely explain international law has, thus, been pushed to the fringe of the discipline or beyond it. This has, as will be discussed below, led to an outcasting of explicit theorising from the canon and, consequently, to a severing of its ties with doctrine and practice. This, as will be seen, makes employing it as an alternative teaching strategy difficult.

[23] Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' 15 *European Journal of International Relations* (2009) 395–422.

[24] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2002).

[25] Carty, *Philosophy*, n. 18 at 9.

3 Emperor without clothes? Positivism in the classroom

Where, in these strategic (teaching) choices, is legal positivism? Indeed, what is legal positivism (in the classroom)? The answer to both questions is complicated by both terminology and tradition. In terms of the former, legal positivism is initially just a particular way of understanding law. Its central concern is the autonomy of law as a discrete field of threat-backed or acculturated ought propositions.[26] From within these premises, there is no wall of doubt, and no need to engage in pragmatic argument to scale it, but simply the objective fact of a(n international) law. It is an objectivity posited upon an empirical reality, not upon an ideal moral universe, as in the earlier natural law tradition. However, following legal positivism's script, the empirical reality on which international law's objectivity is premised is not itself taken to belong to the realm of law and the teaching thereof. Instead, law's reality is represented, notably through such concepts as state consent,[27] international legal process[28] or *pacta sunt servanda*,[29] that is, through common substantiations of a basic norm, a Rule of Recognition, or a 'first constitution'.[30] Being an offspring of the neo-Kantian attempt to salvage philosophy in an age of scientific positivism, it is fundamentally about defining a specifically legal category of cognition, and differentiating it against other categories.[31] Its central purpose is to bestow upon law an unmistakable identity that is autonomous of an empirical (social) reality that could only be described in extra-legal terms. Legal positivism aims both to explain that autonomy,

[26] Definitions of legal positivism abound, but among the most comprehensive and yet concise is Jörg Kammerhofer, 'Positivism' in Anthony Carty (ed.), *Oxford Bibliographies Online: International Law* (Oxford University Press 2012), available at www.oxfordbibliographies.com.

[27] See Brownlie's notorious statement that there is the 'principle that the general consent of States creates rules of general application' (Brownlie, n. 4 at 3).

[28] The classic here is Abram Chayes, Thomas Ehrlich, Andreas Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Little Brown 1973).

[29] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (J. C. B. Mohr 1920); later modified, by Kelsen, to mean 'states ought to behave as they have customarily behaved'. Hans Kelsen, *Principles of International Law* (Rinehart & Co. 1952).

[30] See, respectively, Hans Kelsen, *The Pure Theory of Law* (Max Knight (tr.), University of California Press 1967) and Hart, *Concept*, n. 15; also the discussion by Kammerhofer, Chapter 4 at 94–105.

[31] Stefan Hammer, 'A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law' in Stanley L. Paulson, Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press 1998) 177–194.

and to outline the conditions for understanding law as law.[32] As such, it is, arguably, both a theory of law – i.e. a legal theory – and part of a more general theory of knowledge – i.e. an epistemology. Yet, this dual character of legal positivism betrays its complicated pedigree in the history of ideas and reveals why it has become at once an imperial and absent force – not least in the classroom.

As part of a wider intellectual movement, legal positivism is deeply entangled with the rise of both empiricism and rationalism. Some trace its earliest antecedents – beyond ubiquitous if diffuse Greek roots – to Thomas Aquinas, Marsilius of Padua and William of Ockham,[33] although by most encyclopaedic counts, its direct philosophical undercurrents are Hobbes and Hume, while its trajectory as a distinct theory of law is generally begun with Jeremy Bentham, followed, in rather large historical steps, by John Austin, Hans Kelsen and HLA Hart, with, perhaps, Joseph Raz commonly cited as the most prominent contemporary theorist of legal positivism.[34] Yet, while especially Austin, Kelsen and Hart have acquired the label of quintessential legal positivists, their commonality is really a retrospective reconstruction of the characteristics taken to define legal positivism. Behind the label lurks a complex historical entanglement of positions on general epistemology, the philosophy of science and legal philosophy. Kant and Hegel enter the story through a (continental) backdoor, as does the scientific positivism of the second half of the nineteenth century. Specifically in legal thought, a continental and an Anglo-Saxon brand of positivism emerge. The former is connected to the evolution of the German school of historical jurisprudence into both the *Begriffsjurisprudenz* ('conceptual jurisprudence') of the late nineteenth century and the *Interessenjurisprudenz* ('jurisprudence of interests') of the early twentieth century, and culminating in their (neo-Kantian) transcendence by Kelsen.[35] The latter, in the form of the tradition of analytical

[32] This refers, of course, to the so-called *Methodenstreit* (quarrel over methods) that emerged when, in the early twentieth century, the social sciences began to emerge as a distinct discipline, claiming interpretive 'understanding' as the methodological base of its science, as opposed to the causality-oriented 'explanation' method of the natural sciences. See, inter alia, Toby E. Huff, *Max Weber and the Methodology of the Social Sciences* (Transaction Publishers 1984).

[33] Gerald Postema, 'Legal Positivism: Early Foundations', UNC Legal Studies Research Paper No. 1975470, available at http://ssrn.com/abstract=1975470.

[34] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn Oxford University Press 2009).

[35] Arthur Kaufmann, Winfried Hassemer, Ulfried Neumann, *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart* (7th edn C. F. Müller 2004); see also Gabriel

jurisprudence, led by its twentieth-century *doyen*, HLA Hart, eventually reconnected the two lines in his explicit critique of Kelsen.[36] In terms of intellectual history, the Anglo-Saxon line is, unsurprisingly, the more purely empiricist and utilitarian, or, by today's nomenclature, functionalist, one, whereas the continental trajectory intermixes empiricist motives such as historicism and scientific positivism with rationalist ones coming, in part, from the neo-Kantian programme of salvaging a distinct space for rational reflection within the positivist paradigm.[37]

Both lines converge in their historical practice with their emphasis on the *lex lata* and the strong espousal of the legality derived thereof, that is, of rule by law rather than merely with law.[38] Hence, objectivism is not merely legal positivism's epistemological position with regard to legal cognition, but it may also be seen as implying a stance as to the precedence of law over other fields or functional logics, most notably over politics. Although the latter position does not derive from the premises of legal positivism itself, it has come to be seen as its hallmark: legal positivists are generally seen to believe in and actively defend the rule of law over other paradigms of governance, a legacy for which not least Kelsen, for all his 'purity' but to his honour, is co-responsible.[39] This, then, is part of the reason why legal positivism has, arguably, become a dominant influence in the international law classroom, while being almost entirely absent from it. It is commonly seen as the default position for a formalist approach to law and legal teaching, that is, one which focuses on law as an objective reality, a particular language game, the grammar and syntax of which must be learned more than understood, a particular professional idiom,

Nogueira Dias, *Rechtspositivismus und Rechtstheorie: Das Verhältnis Beider im Werke Hans Kelsens* (Mohr Siebeck 2005) 74–88.

[36] Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011).

[37] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011) 250–251.

[38] Jörg Kammerhofer, Jean d'Aspremont, 'Introduction: Mapping 21st Century International Legal Positivism' (unpublished paper, 2010). [Editors' note: the author refers to the first version of the introductory chapter; in order to preserve the references, that version has been made available at http://ssrn.com/abstract=2372778.]

[39] This alludes, of course, to the notorious opposition between Hans Kelsen and Carl Schmitt during the so-called *Weimarer Staatsrechtslehrerstreit*, the dispute over the Weimar constitution, in which Kelsen fronted positivism, understood as the articulation of the rule of (positive) law, against Schmitt's decisionism; see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Clarendon Press 1999); however, some would argue that, during that debate, Kelsen was arguing from the methodologically distinct perspective of politics rather than law.

fluency of which is the distinguishing mark of the lawyer as opposed to the non-lawyer.[40] And the former is what, arguably, a large majority of law students, including international law students, wish to become. For this group, legal positivism is not so much a theory as a label attached to the formalist style in which law tends to be taught and which is associated with the typical self-differentiating slogans of the professional lawyer, notably that she or he does 'hard law' as opposed to 'soft theory' or 'dirty politics', that she or he is an operator of a ruling discourse, and, as such, a wielder of real power, and that the discourse can be operated without any knowledge of its grounding (or not) in morality or political legitimacy. From this perspective, all 'real' lawyers are legal positivists.

What exacerbates this phenomenon further is, of course, the reality of teaching (international) law. In that reality, the three teaching strategies discussed above are not co-equal alternatives in the international law classroom, for embeddedness in a particular legal tradition is still the primary determinant for the way in which teachers think about their subject. Although today's global knowledge exchange makes it increasingly possible to reach intellectual horizons beyond the methodological traditions of one's respective locality, language and (legal) culture, it is the deeply vested expectations of colleagues and students within a specific curricular tradition as much as the teacher's own cognitive horizon that limit the actual choice of teaching method.[41] From this vantage point, it is, of course, only the doctrinal and the practice-oriented approach that are seen to be rooted in a legal tradition, whereas explicit theorising has, as already hinted, always been seen, by lawyers and law students, as an artificial and contrived way of approaching law, one coming from and fundamentally remaining outside of what, to them, law is all about. Theory does not, therefore, tend to be part of the introductory international law curriculum, and, this being so, legal positivism, too, is by and large not dealt with as what it is, namely a legal theory. Yet, for all this deliberate omission of theory in the classroom, traces of legal positivism are all about it, not through explicit reference to the autonomy of law or legal cognition, but in the way in which law is represented as a coherent and canonical system of rules derived from a fixed set of sources and manifest

[40] See the *German Law Journal* Special Issue on Martti Koskenniemi's *From Apology to Utopia*: Alexandra Kemmerer, Morag Goodwin (eds), 'From Apology to Utopia: A Symposium' 7 *German Law Journal* (2006) 977–1108), especially Florian Hoffmann, 'An Epilogue on an Epilogue' 7 *German Law Journal* (2006) 1095–1102.

[41] Carty, n. 10.

(mostly) in the jurisprudence of authoritative judicial bodies. It is these traces of positivism that provide the cognitive framework for the textbook synthesis of international law encountered by students in the classroom.

This textbook framework is meant to provide a simulacrum of objectivity by alluding to, while not openly articulating, a pseudo-positivism that runs like a red line through both the doctrinal and the practice-oriented approach. Despite all their difference, both of these strategies are deeply entangled with each other, forming, as it were, the methodological amalgam known as the 'mainstream approach'.[42] Hence, with few exceptions, the case-based framework of the common law-inspired Anglo-American style, once converted into the textbook, does not resist the temptation of systematisation, hinting, thereby, at a meta-theoretical standpoint on international law as a body of rules unified by a set of structural elements.[43] Conversely, the doctrinal constructs of the continental approach are inherently challenged by both the fluidity and the fragmentation of international case law.[44] Thus, in the 'mainstream' teaching style, the continental system is effectively coupled with the Anglo-American case-orientated approach to produce a narrative apt to breach the wall of doubt. The representation of this narrative may still moderately differ across traditional divides, from a relatively loose system of overarching principles and a canonical delimitation of the elements of general international law to a fully blown scholastic hierarchy, but both versions share an essential commitment to the discrete identity and objectivity of international law.[45] This 'mainstream position' of doctrinalised practice is the manifestation of a pseudo-positivism which lingers as the hidden elephant in the (class)room. It provides the hoped-for outcome of

[42] The term 'mainstream' is, of course, the coinage of scholars generally critical of it, 'mainstreamers' themselves hardly use the term for self-description; although, in these critical circles it is used with frequency, its precise pedigree is difficult to ascertain and it should probably be seen more as a somewhat diffuse 'fighting term' than as a precise term of art. It is here used to denote the pseudo-positivist self-understanding of that majority of international lawyers who tend not to be theoretically self-reflective. For illustrations of use of the term, see, inter alia, Benedict Kingsbury, 'Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' 13 *EJIL* (2002) 401–436 or James Gathii, 'International Law and Eurocentricity' 9 *EJIL* (1998) 184–211.

[43] If one looks at international law textbooks used in the United Kingdom, Brownlie, n. 4, is clearly the most resistant to this; Shaw, n. 21 is already much more systematising, with, for instance, the structure of Malcolm D. Evans (ed.), *International Law* (3rd edn Oxford University Press 2010) being outright doctrinal.

[44] Carty, n. 10; Carty, 'Convergences', n. 18; Carty, *Philosophy*, n. 18.

[45] See, again, Koskenniemi, n. 3 at 16–17.

mainstream legal teaching, notably the gradual substitution, in students' minds, of the question of why there is international law for the question of how it works. Their mind is then rendered amenable to being trained, rather than reconstructed, which is the typical teaching style of domestic law in both the civil and the common law traditions. Yet, this only works if, indeed, the positivist elephant remains hidden, that is, if it is not revealed as just a legal theory among other legal theories, or, put more broadly, as a theory-based perspective of reality, but if, instead, it shows international law as both the discipline and normative field dealing with the facticity and the validity of law in international affairs.

However, hiding the discipline's positivist premises serves not only to mainstream it into the (domestic) law curriculum, but also allows for it to be 'enriched' with desired substances well beyond the ambit of legal positivism. Indeed, invisibly, the elephant is transformed into a conceptual chimera that incorporates both naturalist and realist elements under the veil of its pseudo-positivist appearance.[46] Any of the resulting paradoxes cannot be queried for as long as pseudo-positivism provides an invisible authority for the mainstream programme. That authority rests on canonisation which, in turn, rests on the cumulative *opinio iuris* of the epistemic community of international lawyers, as articulated in relevant international legal institutions – tribunals, the ILC, the IDI, etc. – and systematised and archived in international law textbooks. This way, the wall of doubt is countered by a wall of certainty upheld through the mechanism of professional self-identification; an international lawyer 'proper' is one who operates within that wall and who will not seriously question or challenge the canon. After all, being canonical is seen by most adherents of this mainstream not as something either methodologically problematic or politically one-sided. Indeed, as Koskenniemi has argued with his 'culture of formalism', mainstream international law is a language game amenable to being used for many ends, including those defined – by extra-legal criteria – as politically progressive.[47] And no matter where (mainstream) international lawyers would position themselves on the political spectrum, the vast majority would, arguably, claim that certain values are inherent in law, in general, and in international law, in

[46] Kammerhofer, Chapter 4. See also the insightful piece, William George, 'Grotius, Theology, and International Law: Overcoming Textbook Bias' 14 *Journal of Law and Religion* (1999–2000) 605–631.

[47] Koskenniemi, n. 24. For a critical-constructive treatment, see d'Aspremont, n. 13.

particular, such as justice, non-violence and equality.[48] From this perspective, the legalisation of international politics has in and of itself a positive connotation, and all those involved in this project are ultimately 'doing good'. This, then, is a major selling point for mainstream international law in classrooms increasingly occupied by students immersed in media-fed images of heroic lawyers and activist lawyering. Once doubt has been substituted by (pseudo-positivist) certainty, international law turns out to be, to many a student, an elegant way to 'improve the world' through professional commitment. Here, international law as a whole is seen as an inherently reasonable discourse that aims to introduce just and equitable standards into a political realm seen to be marked by dishonesty, hypocrisy, intrigue and always the potential for violence.[49] To its adherents, mainstream international law is, therefore, much more than just the pseudo-positivist textbook approach: it is a programme and a mission.[50]

The values that make it so and that transform the positivist elephant into a pseudo-positivist chimera come, of course, from elsewhere, namely from positivism's nemeses: naturalism and realism. And they, arguably, creep in on account of a deep-seated resistance to one of positivism's central tenets, notably its relativism. As was seen, legal positivism is fundamentally about giving law its conceptual due; it asks what law is and how it works, not why it is, what it is, nor what it does beyond itself. Certainly, if the law happens to enshrine values judged to be right in a particular situation – such as fundamental rights vis-à-vis fascist encroachments – then defending legality is itself a value-based action.[51] However, from the positivist perspective, there are no criteria within the law to make this judgment, nor is law capable of incorporating the relevant values on its own behest. Under positivist premises, law must be conceived as value free, and, thus, in strictly relativist terms; an autonomous conceptual identity comes with this self-limitation.[52] An odd corollary of this is, of course, that

[48] Koskenniemi, n. 3; Hoffmann, n. 40.

[49] The value-basis of this view may be particularly pronounced in the British tradition of (formalist) international law teaching which informs the present author's own teaching (and learning) experience; however, it is, arguably, also implicit in many strands of the continental tradition with their priorisation of rule-conformity and lawfulness.

[50] Well exposed in Kingsbury, n. 42; highly critical of this are, of course, Goldsmith and Posner, n. 17.

[51] Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press 1997).

[52] Raz, n. 34.

explicit legal positivism has less difficulty with recognising the distinct role and importance of moral and political discourse than mainstream pseudo-positivism. The latter incorporates both behind the veil of formalism, while nominally denouncing them as 'a-legal'.[53] The underlying reason for this duplicity is, arguably, that hard-edged relativism is fundamentally unattractive to most adherents of the mainstream perspective, running counter to their professional self-perception. Most (mainstream) international lawyers, arguably, wish to 'do good' and have a more or less progressive agenda – be it to uphold world peace by seconding the state system or to fight for human dignity through international human rights. They are decidedly not indifferent, relativist or even nihilist in their outlook, but they wish not to appear to hold any of these positions themselves, or to be associated with personal politics or bias. Instead, the politics of international lawyering is represented as being inherent to the law, a law which is 'merely' applied by the legal practitioner. Political responsibility is not attributed to her, but rather to 'the law'. The international lawyer's politics is, thus, concealed beneath a veil of (political) ignorance and not amenable to be openly debated. Instead, for the mainstream, the law itself does the job, simply on account of being law and, as such, of expressing not personal politics but 'objective' values.

Hans Kelsen discerned this well when he deconstructed the continental jurisprudential schools of the late nineteenth century, not least the long-dominant conceptual jurisprudence (*Begriffsjurisprudenz*) and its naturalist presumption of the coherence of and causality within a legal system conceived as deriving from historically grown fundamental principles.[54] The formalism he set out against was one in which the categories of validity and effectiveness were still merged and where the historical nation-state and the normative concept of statehood were still thought together and as manifestations of a super-historical meaning. Neo-Kantianism, through which Kelsen laboured, sought to simultaneously philosophise the positivist spirit of the times and to counter its inherent materialism by purporting to purge all Hegelian and post-Hegelian remnants from conceptual thought and by concentrating, instead, on the category of validity. By insisting on an autonomous realm of 'ought-'relations, legal positivism brought the naturalist presumptions of earlier formalisms out into the

[53] An anecdotal account of this is given in an ASIL President's Column: José Alvarez, 'International Law 101: A Post-Mortem', ILpost, American Society of International Law, 12 February 2007.

[54] Dias, n. 35 at 105–111.

open. Yet, in doing so, it ironically ended up providing a format through which pseudo-positivism could survive the loss of Hegelian substance. For such a 'pure', apparently value-neutral, normative objectivism was more attuned to the sensitivities of the post-war twentieth-century world than the bombastic state-centrism of the nineteenth, provided it still fundamentally expressed much of the same values underneath. Kelsen's name would, contrary to his intentions, eventually become one of the authorities used to underwrite this pseudo-positivism, while his actual theory, having been self-consciously styled as precisely that, a *theory*, was shelved into a far corner of the international law library, deemed largely irrelevant to teaching and practice.[55]

However, if the trajectory of continental doctrine provides the format for mainstream pseudo-positivism, the Anglo-American practice-oriented approach provides its substance. Two versions of this approach can be distinguished, one centred around traditional state practice, the other around de facto legal process. The first is closely associated with the British pragmatic approach to international law after the Second World War, the second with a specific interpretation of the American realist tradition.[56] Both view law as the better politics and see it as a privileged language to articulate the values that should prevail in international affairs. In case of the former, this programme results from the conclusion by many among the war-generation international lawyers that legalisation was the lesson to be learned from the preceding catastrophe.[57] Although this position conceived itself in opposition to the strict consensualism then associated with positivism, it retained the primary vestige of positivism in its positing the objectivity of international law independent of state volition. And it engaged in a textbook and teaching programme which expounded that law in its practical operation, most notably before international tribunals. The judge, thus, came to incorporate the quintessential international lawyer, her perspective defined and limited by the practical demands of adjudication based on an objectively ascertainable body of

[55] Martti Koskenniemi, 'The Wonderful Artificiality of States' 88 *ASIL Proceedings* (1994) 22–29; Anthony Carty, 'Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt' 16 *Cardozo Law Review* (1995) 1235–1292.

[56] For an overview of some of the repercussions of this, see Gerry Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power' 11 *EJIL* (2000) 439–464.

[57] On this, see Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' 2 *EJIL* (1997) 215–263.

rules.[58] The motivation behind this 'practitioners' approach' is, however, not the concretisation of a theoretical demand (of positivism), but the conviction that a judicially enforced international rule of law represents in itself a desirable value that ought to be propagated. In parallel, certain strands or outgrowths of American legal realism have also fed into the contemporary mainstream, most notably those concerned with international legal process and 'law as policy'.[59] In both versions, the objectivity of a – procedurally conceived – international law is presupposed, as are certain values embodied by international legal process. Neither perspective is overtly positivist or formalist, but they, arguably, make up part of the imagery of mainstream formalism. Legal positivism, then, is present through its absence in the international law classroom. It is like the emperor without clothes, or rather, an emperor adorned with clothes which are at once too large and too small. He,[60] at any rate, appears as something quite different from his (classroom) subjects, a Hercules rather than a Hermes. Perhaps, that is what most students want to see.

4 Clothes without an emperor: piecing together global normativity

Yet, what else could they see? Is there a viable alternative strategy to the mainstream of doctrinalised practice for international law teaching? Or, indeed, to legal positivism proper, that is, to the 'science of law' as Kelsen imagined it? What does the theory front have on offer? A central problem for contemporary international legal theory remains its methodological haziness. The discipline's theory-aversion has meant that the common jurisprudential approaches have only been partially or imperfectly present in international legal theorising, while explicitly theoretical endeavours have favoured methodological *bricolage*, drawing on a range of 'external' disciplines and vocabularies in order to construct specific arguments rather than to build *grand theory*.[61] Although

[58] Anthony Carty, 'Why Theory? The Implications for International Law Teaching' in Philip Allot *et al.* (eds), *Theory and International Law: An Introduction* (British Institute of International and Comparative Law 1991) 73–104.

[59] Mark Weston Janis, *America and the Law of Nations 1776–1939* (Oxford University Press 2010); Harold Hongju Koh, 'Why Do Nations Obey International Law?' 106 *Yale Law Journal* (1997) 2599–2659.

[60] The male form is used here merely on account of the title of the tale by Hans Christian Andersen, 'The Emperor's New Clothes' (1837).

[61] See exemplarily Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' 2 *EJIL* (1991) 1–27; see also, again, Simpson, n. 56.

the meta-theoretical divide between rationalism and empiricism cuts through the theorising of international normativity in the same way as it does in any other social science discipline, there is little engagement with epistemological foundations and scientific method. Many of the (meta-)theoretical moves that have shaped other disciplines have been received into international law, if at all, with delay and in outdated or simplified form. The belated 'discovery' of the concept of culture,[62] the (earlier) turn to language[63] and the (later) turn to history,[64] or the idea of legal pluralism in the international sphere[65] are but a few examples. Generally, international law as a discipline continues to struggle with a self-reflexive and self-conscious engagement with its own methodological identity. Some of those who aim to provide its theoretical undercurrents have taken a rationalist turn (to philosophy and related humanities) or an empiricist one (to sociology and related social sciences). The theoretically interested majority has, arguably, tried to budge that choice by turning to history and hermeneutics.

A number of theoretical currents have come out of these choices and frame the contemporary debate: the most common of these is, arguably, neo-formalism, which seeks to encapsulate the 'practitioner's approach' by building on the positivist tradition; in so doing, it has appealed to many theory-friendly practitioner-scholars, but also to a number of critical thinkers who have seen in the 'culture of formalism' a progressive contribution to international politics.[66] The self-conceived counterpart

[62] See exemplarily Paul Meerts (ed.), *Culture and International Law* (T. M. C. Asser Press 2008); Sally Engle Merry, 'Constructing a Global Law – Violence against Women and the Human Rights System' 28 *Law and Social Inquiry* (2003) 941–974.

[63] This was, of course, the general move within critical legal studies. See, for instance, Costas Douzinas, Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005).

[64] George Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' 16 *EJIL* (2005) 539–559; the continuing trend towards historisation in international law is also impressively articulated through this recent book: Bardo Fassbender, Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press 2013).

[65] Peer Zumbansen, 'Transnational Legal Pluralism' 1 *Transnational Legal Theory* (2005) 141–189.

[66] An illustration is provided by the various reviews of *The Gentle Civilizer* (Koskenniemi, n. 24) such as Marius Emberland, '[Book Review:] Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960' 52 *ICLQ* (2003) 272–274; Robert Cryer, '*Déjà vu* in International Law' 65 *Modern Law Review* (2002) 931–949; Brian Simpson, '[Book Review:] Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960' 96 *AJIL* (2002) 995–1000. See also the insightful reflection by Jason Beckett, 'The Politics of International Law –

to formalism and formalists is, in turn, played by the highly disparate set of approaches commonly grouped under the label of critical (legal) thought. They, broadly, fall into three methodological streams, notably: post-modern perspectives inspired, inter alia, by French post-structuralism, linguistics, and psychoanalysis and interested mainly in the indeterminacy of legal language and the politics behind the law;[67] Marxist perspectives drawing on a historical-materialist framework of analysis and mainly interested in international law's implication in imperialism, colonialism and global capitalism;[68] and pragmatic/legal realist perspectives focusing on the techniques and strategies of international legal governance.[69] In combination, they have provided the theoretical undercurrents for a number of critical movements such as 'new approaches to international law' (NAIL) or 'third world approaches to international law' (TWAIL).[70] At the opposite end of the critical spectrum and clearly outside the bounds of 'critical legal theory', yet critical nonetheless, lies the currently foremost jurisprudential trend in North America, namely the economic analysis of law (EAL). Building on the legal realist tradition and methodologically premised on rational choice theory, its foray into international law has been largely deconstructive of the mainstream position and its inherent legalism.[71]

Much of the theoretical debate within international law has been shaped by these two master perspectives, although a number of other approaches have emerged in their shadow. Most methodologically distinct are the sociological approaches to international law that focus on the taxonomy and systematisation of international legal phenomena; among them

Twenty Years Later: A Reply' *EJIL: Talk!* 19 May 2009, available at www.ejiltalk.org/the-politics-of-international-law-twenty-years-later-a-reply/.

67 Peter Fitzpatrick, Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate 2004) and the insightful review by Akbar Rasulov, 'International Law and the Poststructural Challenge' 19 *LJIL* (2006) 799–827.

68 See, again, Marks, n. 7.

69 See exemplarily David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005).

70 Akbar Rasulov, 'New Approaches to International Law: Images of a Genealogy' in José María Beneyto, David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (Springer 2013) 151–192; James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography' 3 *Trade, Law and Development* (2011) 26–48.

71 See, again, Goldsmith and Posner, n. 17, as well as Eric Posner, *The Perils of Global Legalism* (University of Chicago Press 2009).

are such projects as global administrative law (GAL),[72] the Policy Science approach (New Haven School),[73] international legal process[74] and, indeed, the theory of autopoietic law.[75] Perhaps furthest out on the margins today is the predominant school of the past, namely natural law, the concern of which with the deeper rationality of rules lives on in the reception of analytical naturalism in international law and, of late, in a more continental-humanist project seeking to reframe the language of international legal discourse.[76]

These theoretical divides and thematic concerns are cross-cut by geographical dimensions, with certain approaches to international law being associated, often stereotypically, with scholarship from particular places. In this scheme, Europe tends to be seen as formalist and the United States as realist, and within Europe the United Kingdom as most purely formalist, France as formalist-sociological and Germany as formalist-constitutional. Lastly, the theorisation of international law from within the discipline has to be seen in the broader context of its theorisation from outside and, most notably, from the perspective of 'international relations' (IR). Having emerged as a methodologically distinct discipline in the post-war period, theory has always played a self-consciously constitutive role in IR, with its methodological foundations and theoretical vocabularies far more systematically developed than those of international law.[77] Curiously, the latter has not tended to be among the primary subjects of IR research, with there even being a degree of residual scepticism about the currency of international normativity especially among realist schools.

[72] Benedict Kingsbury, Nico Krisch, Richard B. Stewart, 'The Emergence of Global Administrative Law' 68 *Law & Contemporary Problems* (2005) 15–61; critically, Ming-Sung Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' 44 *New York University Journal International Law and Politics* (2011) 55–102.

[73] Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?' 32 *Yale Journal of International Law* (2007) 559–574.

[74] See, again, Chayes, Ehrlich and Lowenfeld, n. 28 and for a more recent elaboration, arguably, Anne-Marie Slaughter, 'International Law in a World of Liberal States' 6 *EJIL* (1995) 503–538.

[75] Gunther Teubner, Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 *Michigan Journal of International Law* (2004) 999–1046.

[76] For the former, see Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' 12 *EJIL* (2001) 269–307; for the latter, see Carty, n. 18.

[77] Jeffrey L. Dunoff, Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012).

However, with the rise of constructivism as a theoretical endeavour in IR, international law and, generally, the role of norms in international affairs has become an important research concern. Here, the question of compliance has been a particular interest, shared by and partially examined in conjunction with the sociological currents in international legal theory.

However, while an aversion to 'theory as theory' continues to be a strong undercurrent in the discipline, a number of issues have emerged over the past decade or so which have brought overtly theoretical concerns into the 'mainstream'. The alleged fragmentation of the canonical corpus of international law into distinct legal regimes, operating in an increasingly autonomous and partially incompatible fashion, has triggered a new interest in the (theoretical) reflection on the systematicity of international law. The most coherent and school-like of the theoretical endeavours that have come out of this concern has been constitutionalist thought which seeks to identify emerging standards of global (legal) governance in different regimes such as international trade law, human rights, humanitarian law or international criminal law.[78] In parallel, the proliferation of non-state actors has fostered a new theoretical engagement with the quality of sovereignty and the sources recognised to identify it.[79] Lastly, the perennial problem of compliance has continued to inspire theoretical reflection on the nature of statehood, normativity and legal governance.[80]

Yet, which of these theoretical alternatives to positivism would do as a viable alternative in the introductory international law classroom? Which of these have similar systemic aspirations as legal positivism, which set out a coherent enough alternative language game to work in and for a professional epistemic community, which might be amenable to a new form of practice? The answer to this is neither facile nor would it be properly covered in a piece on international law teaching. Indeed, whether there is an alternative to (pseudo-)positivism is, perhaps, the cutting-edge question of contemporary international legal theory. Part of the difficulty of identifying any particular theoretical position in this respect lies in

[78] Bogdandy, n. 9; Jeffrey L. Dunoff, Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009).

[79] E.g. Anthea Elizabeth Roberts, Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' 37 *Yale Journal of International Law* (2012) 107–152.

[80] Kal Raustiala, Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlnaes, Thomas Risse, Beth A. Simmons (eds), *Handbook of International Relations* (Sage Publications 2002) 538–558.

the fact that few if any current theorising of international law engages in self-conscious grand theory with systematic aspirations. Most of the positions mentioned above do not purport to substitute international law as a positivised system of rules with anything else, but they merely aim to either complement the current canon – such as by proposing a more pluralist sources doctrine – or to critique it by uncovering its structural bias and its inherent indeterminacy. None of them purports to substitute the idea of legality, and with it, the legalisation of international affairs, with anything else – such as their re-politicisation.[81] Virtually all of their proponents identify themselves as international lawyers – with the obvious exception of international relations scholars – and appear weary to sacrifice the professional benefits of belonging to this caste by fundamentally stepping outside of the mainstream.

Of the approaches mentioned above, the overtly critical lines of thought (CLS and EAL) are, by and large, premised on the existing mainstream and its shortcomings. They either focus on the micro-level (post-modern and realist CLS as well as EAL) and, thus, on the rationality and ethics of the agents of international law, or on the macro-level (Marxist CLS) and on its structural determinants. The sociological frameworks, in turn, fulfil the prerequisites for being systematic alternatives to the mainstream narrative to a much greater degree, but, in terms of their significance for the international law classroom, they suffer from either a lack of comprehensiveness or of professional relevance, or both. While the original New Haven approach certainly represented a self-conscious attempt to put in place an alternative logic as well as language for international normativity, and while it aspired to comprehensiveness, it never managed to gain any wider adherence in professional legal or political circles. Although it was conceived as the legal international arm of a general concept of scientific policy-making, it was marred by its explicit bias towards so-called 'Western values' and a language that, contrary to its aspirations, did not reflect the 'real' language of international policy-making.[82] By contrast, the global administrative law project aims to go back to the original purpose behind international law as a jurisprudential discipline, namely

[81] For an as yet very tentative hint towards how such a re-politicisation could be conceived, see Florian Hoffmann, 'Facing the Abyss: International Law before the Political' in Marco Goldoni, Christopher McCorkindale (eds), *Hannah Arendt and the Law* (Hart 2012) 173–190.

[82] Hengameh Saberi, 'Love it or Hate it, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity' 35 *Boston College International and Comparative Law Review* (2012) 59–144.

that of identifying, collecting and systematising the rules that govern international affairs. As such, it is essentially an attempt to modernise the canon by opening up the box and creating a clean slate in terms of the ways in which global norms are identified today. What it finds is not merely a multiplicity of sources that breach the traditional divides between public and private, international and transnational, hard and soft, but a more or less comprehensive system of administrative principles that configure the way in which norms are created and applied in any setting. This global administrative law as they see it is a sort of meta-law that pervades and ultimately controls all legal fields.[83] Although the GAL project is still somewhat incipient and has not yet drawn a comprehensive map of administrative meta-legality, it clearly aims to eventually be a powerful alternative to the canon, with its power coming from its rootedness in factual normative phenomena as opposed to idealist norm constructions. Yet, it, too, has been critiqued for being inherently biased towards Western principles of good governance and, thus, for shrouding an idealist conception of global governance under a cloak of purported empirical fact. In a sense, global administrative law sets out to be the new positivism, but, having done away with either state consent or a universally accepted basic norm as a foundation for the legitimacy of global (legal) governance, it, as yet, floats in the air. That said, many of its precepts are creeping into professional legal discourse and the growing de facto currency global administrative principles carry in legal proceedings ought not to be underestimated. But is it ready, yet, to take over in positivism's stead and be taught?

The same question has to be put to the third of the sociological approaches, the theory of autopoietic systems as applied to international law. For some time now, Luhmannian legal thought has transcended the analytical bounds of (so-called) domestic law and has reached out to transnational and global normativity. In fact, it has provided the most comprehensive and coherent, if not uncontested, analytical vocabulary through which transnational legal governance and global law can be theoretically captured.[84] Yet, the empirical focus of this analysis has mostly

[83] Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' 20 *EJIL* (2009) 23–57 and Alexander Somek's engaging reply: Alexander Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' 20 *EJIL* (2009) 985–995.

[84] See exemplarily Gunther Teubner (ed.), *Global Law without a State* (Dartmouth 1997).

been on (so-called) private legal processes, such as on the notorious *lex mercatoria*,[85] not least as it is in the complex unfolding of transnational private rule-making that a global legal process emancipated from the state is in clearest evidence. More recently, however, an attempt has been made to broaden the (legal) systems theoretical perspective and (re-)describe the internal functioning of and interaction among public legal and, in particular, constitutionalised legal fields. Here, autopoiesis and regime theory have been merged in order to reframe what, from the perspective of more traditional legal analysis, has appeared as the intractable problem of fragmentation.[86] In their ground-breaking work on regime collision, Gunther Teubner and Andreas Fischer-Lescano have put what amounts to an 'autopoietic regime theory' to work on some of the most deadlocked debates in international law, such as intellectual property (in relation to medicines), transnational criminal law or cybercrime, among others.[87] What makes this approach so innovative is that it radically breaks with the logic of unity and hierarchical organisation which underlies the conventional model of international law. For the latter is bound to consider the de facto legal polycentricity that characterises international normativity as an undesirable fragmentation in need to be overcome through a complex system of secondary and tertiary rules that re-unify everything in a hard normative centre.[88] Instead, they postulate the inevitability of legal polycentricity on the basis of Luhmann's early observation that world society is (inherently) without a head or a centre,[89] and re-describe international law as a transnational network of differentiated norm systems that dynamically interact.[90] Indeed, interaction is the core feature

[85] See, inter alia, Gunther Teubner, 'Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria' 5 *European Journal of Social Theory* (2002) 199–217.

[86] See, generally, Gunther Teubner, Andreas Fischer-Lescano, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp 2006).

[87] Teubner and Fischer-Lescano, n. 86.

[88] See, for instance, the report by the International Law Commission (Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission', UN Doc. A/CN.4/L.682 (13 April 2006)).

[89] Niklas Luhmann, 'Die Weltgesellschat' 57 *Archiv für Rechts- und Sozialphilosophie* (1971) 1–35.

[90] Teubner and Fischer-Lescano, n. 75 at 999; Teubner and Fischer-Lescano, n. 86 at 7; Gunther Teubner, '"Global Bukowina": Pluralism in the World Society' in Gunther Teubner (ed.), *Global Law without a State* (Aldershot 1997) 3–28; Gralf-Peter Calliess, 'Systemtheorie: Luhmann/Teubner' in Sonja Buckel, Ralph Christensen, Andreas Fischer-Lescano (eds), *Neue Theorien des Rechts* (Lucius & Lucius 2006) 57–71.

of this network, with mutual irritation and adaptation being the forces that hold it together. From this perspective, global law essentially emerges from and through regime collision, which is, hence, at the core of this type of legal analysis. This collision is taken to have two causes: first, each such regime has an inherent tendency to maximise its own particular rationality (*Eigenrationalität*) against other regimes, thereby increasing fragmentation and creating a relation of antagonism between different regimes.[91] And second, functional differentiation means that norms and institutions increasingly fulfil only one, rather than several, functions in a highly specialised and, hence, efficient way. This, in turn, means that the specific risks associated with that function are minimised or 'absorbed' in ways that may be incompatible with the risk absorption strategy of other functional systems.[92] As a consequence, a regime's optimised risk absorption strategy may represent increased risk or danger for another regime; regime conflict is, hence, a 'natural' result. Perhaps even more so than global administrative law, autopoietic legal theory provides a powerful analytical framework with which to explain many of the international legal phenomena that remain unexplained, and, thus, ignored, by (traditional) legal positivism. Yet, unlike global administrative law, it is a purely extra-legal perspective that reconstructs global law through the logic of systems theory. As such, it is most closely related to the Marxist framework of macroscopic analysis, focusing on the forces behind or, rather, underneath the law seen as a mere epiphenomenon. It consequently serves critical insight but not professional training, or, put differently, it explains how law functions and why the operators of the law do what they do, but it does not provide an understanding of that operation from the perspective of the operator.

There remains, then, paradoxically, this very perspective as an alternative to the pseudo-positivist mainstream, notably neo-formalism. The most coherent contemporary articulation by far has been provided by Martti Koskenniemi's 'culture of formalism', which seeks to reframe international legal discourse from within formalist premises, notably by showing it to contain all the elements necessary to move it back from the current apologism to a politically progressive utopia. Thus, to Koskenniemi, the vocabulary of formal (legal) norms and the judicial and quasi-judicial institutions within which it is performed provides the most

[91] Teubner and Fischer-Lescano, n. 75 at 1005.
[92] Teubner and Fischer-Lescano, n. 75 at 25.

hopeful platform for transformative politics under current global conditions, provided such strategic legal interventionism is aware of its own contingency and refrains from essentialising its lacking centre through reified concepts such as governance, human rights, constitutionalisation, etc.[93] Indeed, the emphasis is all on strategic processes that avoid crystallisation into firm institutions or structures and thereby stay clear of the legal managerialism which has, for Koskenniemi, taken over the profession.[94] Even though the theoretical underpinnings of the 'culture of formalism' clearly betray its critical pedigree, it has nonetheless left the door open for interested members of 'the profession' – since their professional practice would appear to be quite compatible with Koskenniemi's 'strategic formalism' – provided their political intentions are progressive, as would, arguably, be the case with many contemporary practitioners of 'lawfare',[95] especially in such legal fields as human rights, humanitarian law, environmental law or labour law. The 'culture of formalism' has, in other words, also and, perhaps, especially appealed to 'practitioners' in search of a theory. More importantly, perhaps, it deals out a new hand for international legal theorising, for it confronts any quest for alternatives with the facticity and functionality of 'traditional' formal legal language and the 'real existing' interpretative community of international lawyers. This, then, is both a critical and an affirmative move, based, in essence, on the idea that exposing pseudo-positivism to deconstructive critique and, thereby, showing that the nakedness of the emperor does not, in fact, do away with him, but brings out his real powers. These powers, to Koskenniemi, consist of the relative universality which an aesthetically well-crafted language game can provide. As such, the 'culture of formalism' can be seen as a post-modern development of the idea of legal positivism, away from epistemology and towards action. Would this then open up a new way of teaching old international law, with less pretence and the courage to see its relativism in the eye? As yet, the 'culture of formalism' is only a sketch, with its drafter having, meanwhile, performed a *Kehre* towards history, leaving grand theorising behind. Is the proposition of a post-modern

[93] See, however, for a more nuanced examination of the relationship between acknowledged contingency and 'false' necessity, Susan Marks, 'False Contingency' 62 *Current Legal Problems* (2009) 1–21.

[94] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' 29 *EJIL* (2009) 7–19.

[95] Iain Scobbie, 'On the Road to Avila? A Response to Koskenniemi' *EJIL: Talk!*, 20 May 2009, available at www.ejiltalk.org/on-the-road-to-avila-a-response-to-koskenniemi/.

positivism, perhaps, a next step towards converting this sketch into a full picture?

5 From positivist teaching to teaching positivism

What could that picture look like in the international law classroom, which teaching strategy could follow from it? Surely not 'doctrine' and 'practice', as both are, as was seen, the pillars of the pseudo-positivist mainstream. Nor, however, merely 'theory', as that only aims at external explanation rather than internal understanding, even if any neo-formalist/post-modern positivist teaching strategy would have to include a heavy dose of 'theory' so as to generate distancing and self-reflection. A first positive step in the construction of such a strategy would probably have to be a refocusing of the teaching experience, away from logical game-playing (doctrine) or training (practice) and towards critical knowledge construction. This would imply that students were equipped with the tools to simultaneously learn the vocabulary, grammar and syntax of the language game of international law and to reflect on their doing so from a meta-perspective. The aim would be for students to be able to speak the language at the same time as they understand its linguistic deep structure, and to become sensitive to the tension between these two perspectives as well as to make that tension productive. This flows from the precepts of the concept of relativist practice which underlies neo-formalism and, arguably, post-modern legal positivism. It would, ultimately, be all about learning to tolerate the fact that the emperor is naked and to grasp the full force that his nakedness represents. A precondition for this learning experience would, of course, be that the aura of objectivity that pseudo-positivism creates is dissolved, and with it, the halo of professional authority that surrounds it. Teaching positivism stripped of its metaphysical cloak means to teach students to withstand the terrifying spectacle of the pure relativity of (positive) law, to countenance its closedness, to affirm its solipsism. This would imply teaching without the cosmetics of institutional gravitas or activist lawfaring; instead, it would require a refocusing, from 'within', on the critical reflection of doctrine and on the self-distancing from practice.[96] Such naked positivism would, perhaps ironically, free international law students to discern the 'other' of (international) law, namely politics, more

[96] This is not identical to, but is resonant of, Martti Koskenniemi's ideas on legal education, as expounded in Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' 1 *European Journal of Legal Studies* (2007) 1–21.

succinctly, thereby putting them in a better position to judge what is law's and what is politics' domain, and to act accordingly. Thus, the wall of doubt would not need to be artificially dispelled, but would, instead, be the basis for the critical consciousness necessary to distinguish law from politics. This, in turn, would be the precondition for rendering the tension between the two productive in and for the 'international'.